In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 238

OLSON BODIES INC., formerly GRUMMAN ALLIED INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA (UAW)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The first question presented—whether the Board is required to grant plenary review of a determination made by its regional director in a representation proceeding, pursuant to the delegation permitted by Section 3(b) of the National Labor Relations Act, before that determination may serve as the basis for an unfair labor practice finding and order—is essen-

tially the same as that presented in *Magnesium Casting Company* v. *National Labor Relations Board*, No. 370, 1970 Term. The Board has not opposed the petition in No. 370 because the decision of the First Circuit in that case, answering this question negatively, conflicts with the decision of the Second Circuit in *Pepsi-Cola Buffalo Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676, certiorari denied, 396 U.S. 904.

In the present case, a different panel of the Second Circuit[1] concluded that plenary Board review was not required. It distinguished *Pepsi-Cola* on the ground that the court "was there dealing with an issue, whether distributors were employees or independent contractors, which * * * 'is difficult and requires a fine-drawn balancing of facts and law,'" while the "questions here were the refusal to arrange for absentee or home voting by ill employees and the correctness of the inference the Regional Director had drawn from largely undisputed facts relating to the work of a single employee" (Pet. App. 7a).

The validity of the distinction drawn by the Second Circuit in this case is not a question of sufficient importance to justify further review. Thus, if the Court were to deny the petition in No. 370, it should also deny this petition. If, on the other hand, the Court grants the petition in No. 370, the distinction would become unimportant if the Court upheld the

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[1] The panel consisted of Judges Friendly, Smith, and Feinberg. Only Judge Smith was on the *Pepsi-Cola* panel.

view of the First Circuit, since *Pepsi-Cola* would then lose all vitality; and the distinction would similarly become equally unimportant if the Court adopted the *Pepsi-Cola* rule as the Second Circuit originally formulated it. Accordingly, the Court should defer ruling on the first question presented until it has decided No. 370.

2. The remaining questions present no issue warranting review by this Court. The second question (Pet. 2) simply challenges the Board's upholding the Regional Director's refusal to supplement the usual manual ballot procedures by providing for absentee or home voting by four employees who were away because of illness. Such a decision, which is in accordance with well-settled Board precedent and was sustained by the court of appeals, is well within the allowable discretion vested in the Board for the purposes of conducting representation elections. See *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330-331, 333; *IT&T Corp.* v. *National Labor Relations Board*, 294 F. 2d 393, 394-395 (C.A. 9).

The third question (Pet. 2-3)—whether the Company was entitled "to a hearing where there are material and substantial disputed issues of fact"—is not presented on this record. The Board's rules provide for a hearing on exceptions to a report on challenges and objections where "substantial and material factual issues" are raised. 29 C.F.R. § 102.69(c). The Regional Director's decision concerning Davenport's status in the unit (Pet. App. 29a-37a) involved no issue of credibility. The decision turned, as the court

of appeals noted (Pet. App. 6a), on the inference to be drawn from largely undisputed facts, and neither the Board nor the court of appeals were advised of any significant additional material that could be presented. See *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408, 416 (C.A. 3).[2] Accordingly, the Board properly invoked its "rule against relitigation" in the ensuing unfair labor practice proceeding of issues determined in the prior representation proceeding. See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 161-162.

Respectfully submitted.

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Solicitor General.

ARNOLD ORDMAN,
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National Labor Relations Board.

JULY 1970.

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[2] Contrary to petitioner's contention (Pet. 18-19), neither the record nor the Regional Director's resolution of the challenge indicated that the statements of any affiants unknown to the Company were considered in reaching that conclusion.

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